

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

SODI MANN,

Plaintiff,

v.

PLY GEM PACIFIC WINDOWS
CORPORATION; CORNERSTONE
BUILDING BRANDS SERVICES, Inc.;
and MICHAEL WELTER,

Defendants.

No. 2:24-cv-01328-DJC-AC

ORDER

Before the Court is Plaintiff Sodi Mann's Motion to Remand this action to California Superior Court. Defendant removed the suit on the basis of diversity jurisdiction arguing that Michael Welter, who would otherwise defeat diversity, is a "sham defendant" because the Intentional Infliction of Emotional Distress ("IIED") claim against him fails. For the reasons presented below, the Court finds that Defendant Welter is not a sham defendant, and thus the Court lacks jurisdiction over this matter.

I. Background

Plaintiff's claims against his former employer Ply Gem Pacific Windows Corporation, a subsidiary of Cornerstone Building Brands, Inc, and his former supervisor Michael Welter (collectively, Defendants), arise from the denial of Plaintiff's

1 family medical leave request and subsequent termination. (Not. of Removal, Ex. A
2 ("Compl.") (ECF No. 1-1) ¶¶ 1-5, 11-15.) Plaintiff alleges that when he requested leave
3 to care for a family member one week in advance, he was wrongfully and deceptively
4 told by Welter that Ply Gem required two weeks of notice and that he could not grant
5 the request. (*Id.* ¶¶ 11-12, 63.) Plaintiff took the leave regardless, and his
6 employment was later terminated. (*Id.* ¶1.)

7 Plaintiff, a California resident, originally filed this action in the Superior Court of
8 California, County of Sacramento. (*Id.* ¶1; Not. of Removal (ECF No. 1) at 1.)
9 Defendants removed the case based on diversity jurisdiction, arguing that Defendant
10 Welter, who is a California resident, was fraudulently joined for jurisdiction purposes
11 and is a sham defendant. (Not. of Removal at 3-6.) Plaintiff brings the present Motion
12 to Remand arguing that Welter is not a sham defendant, and that the case should
13 therefore be remanded for lack of jurisdiction. (Mot. to Remand (ECF No. 7).) The
14 motion is fully briefed with Defendants filing an Opposition (ECF No. 13), and Plaintiff
15 filing a Reply (ECF No. 15).

16 This motion is submitted on the pleadings without oral argument pursuant to
17 Local Rule 230(g). The hearing on Defendants' Motion to Dismiss (ECF No. 3) and
18 Plaintiff's Motion to Remand, set for July 11, 2024, is VACATED. The parties' Joint
19 Request for Remote Appearance (ECF No. 17) is DENIED AS MOOT.

20 **II. Legal Standard for Motion to Remand**

21 A case may be removed to federal court if that court would have original
22 jurisdiction over the matter, which generally requires asserting federal question
23 jurisdiction under 28 U.S.C. § 1331 or diversity jurisdiction under 28 U.S.C. § 1332.
24 See 28 U.S.C. § 1441; *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042 (9th Cir. 2009).
25 "However, it is to be presumed that a cause lies outside the limited jurisdiction of the
26 federal courts and the burden of establishing the contrary rests upon the party
27 asserting jurisdiction." *Hunter*, 582 F.3d at 1042 (quoting *Abrego v. The Dow Chem.*
28 Co., 443 F.3d 676, 684 (9th Cir. 2006) (citation omitted)) (internal quotation marks and

1 alterations omitted). As a result, “[t]he ‘strong presumption against removal
2 jurisdiction means that the defendant always bears the burden of establishing that
3 removal is proper,’ and that the court resolves all ambiguity in favor of remand to state
4 court.” *Id.* (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (per curiam)
5 (internal quotation marks omitted)).

6 **III. Discussion**

7 Under the doctrine of “fraudulent joinder” or “sham defendant,” a federal court
8 may ignore a non-diverse defendant’s citizenship if either of two stringent standards
9 are met: “(1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the
10 plaintiff to establish a cause of action against the non-diverse party in state court.” See
11 *Grancare, LLC v. Thrower by and through Mills*, 889 F.3d 543, 548 (9th Cir. 2018)
12 (quoting *Hunter*, 582 F.3d at 1044-46 (citations omitted)). Defendants challenge the
13 joinder of Defendant Welter on the second basis, which requires Defendants to show
14 there is no possibility that a state court would find that the Complaint states a cause of
15 action against Welter. See *id.* (quoting *Hunter*, 582 F.3d at 1046). Defendants “bear a
16 ‘heavy burden’ since there is a ‘general presumption against [finding] fraudulent
17 joinder.’” *Grancare, LLC*, 889 F.3d at 548 (quoting *Hunter*, 582 F.3d at 1046 (citations
18 omitted)) (alteration included).

19 Establishing an inability to state a cause of action against the non-diverse
20 defendant requires more than showing that the claim does not meet the standards for
21 a motion to dismiss under Rule 12(b)(6). Rather, the court must determine “whether
22 there is a possibility that a state court would find that the complaint states a cause of
23 action against any of the resident defendants.” *Hunter*, 582 F.3d at 1046 (quoting
24 *Tillman v. R.J. Reynolds Tobacco*, 340 F.3d 1277, 1279 (11th Cir. 2003)) (emphasis
25 added); *Grancare*, 889 F.3d at 549-50 (“A claim against a defendant may fail under
26 Rule 12(b)(6), but that defendant has not necessarily been fraudulently joined.”).
27 “Consequently, if a defendant simply argues that plaintiff has not pled sufficient facts
28 to state a claim, the heavy burden of showing fraudulent joinder has not been met.”

1 1 *Ontiveros v. Michaels Stores, Inc.*, No. CV-12-09437-MMM-FMO, 2013 WL 815975, at
2 2 *5 (C.D. Cal. Mar. 5, 2013) (collecting cases).

3 As the Ninth Circuit has recognized, fraudulent joinder is typically used to assert
4 procedural defenses and immunities that are distinct from the underlying merits of the
5 claim. See *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1320 (9th Cir. 1998); *Grancare,*
6 LLC, 889 F.3d at 548-49 ("A standard that equates fraudulent joinder with Rule
7 12(b)(6) conflates a jurisdictional inquiry with an adjudication on the merits.")
8 (collecting cases). For example, a successful statute of limitation challenge, see
9 *Ritchey*, 139 F.3d at 1320 and *Hamilton Materials, Inc. v. Dow Chem. Corp.*, 494 F.3d
10 1203, 1206 (9th Cir. 2007), a state law privilege, see *McCabe v. Gen. Foods Corp.*, 811
11 F.2d 1336, 1339 (9th Cir. 1987), or other inability to hold the defendant liable, see
12 *United Comput. Sys., Inc. v. AT & T Corp.*, 298 F.3d 756, 761 (9th Cir. 2002), are
13 instances in which fraudulent joinder may be established because those defenses
14 render the claim "impossible."

15 Here, Defendants do not assert a procedural bar or immunity defense, but
16 argue that Plaintiff cannot establish his IIED claim against Welter because the conduct
17 at issue is not "extreme and outrageous." As part of an IIED claim, the plaintiff must
18 allege that the conduct the defendant engaged in was "so extreme as to exceed all
19 bounds of that usually tolerated in a civilized community." *Davidson v. City of*
20 *Westminster*, 32 Cal. 3d 197, 209 (1982). California courts have determined that most
21 personnel management decisions are "not alone sufficient to satisfy the standard for
22 extreme and outrageous conduct." *Gibson v. Am. Airlines*, No. C-96-1444-FMS, 1996
23 WL 329632, at *4 (N.D. Cal. June 6, 1996) (citing *Pitman v. City of Oakland*, 197 Cal.
24 App. 3d 1037, 1047 (1988)); *Janken v. GM Hughes Elecs.*, 46 Cal. App. 4th 55, 80
25 (1996) (claim that a personnel management decision was improperly motivated
26 should be brought against employer, not an individual supervisor). Even so,
27 management actions may be sufficient to establish a claim "where a fundamental
28 interest of the employee is violated in a deceptive manner that results in the plaintiff

1 being denied rights granted to other employees" *Id.* at *1, *4 (wrongly recording
2 the plaintiff's time off in a way which would damage her standing and denying the
3 plaintiff family medical leave could support an IIED claim such that the defendant was
4 properly joined); *Rulon-Miller v. International Bus. Machines Corp.*, 162 Cal. App. 3d
5 241, 254 (1984) (plaintiff plead possible IIED claim against manager who terminated
6 her for having romantic relationship with manager of rival firm without giving her time
7 to end the relationship).

8 In a similar case alleging IIED, *Calero v. Unisys Corp.*, the court found that there
9 was a possibility that a state court could find that the plaintiff established the cause of
10 action against the non-diverse defendant. 271 F. Supp. 2d 1172, 1178 (N.D. Cal.
11 2003). There, the plaintiff alleged that the supervisor had terminated the plaintiff for
12 taking a medical leave of absence after the supervisor had "deceived him into thinking
13 that plaintiff had done all that was necessary to secure his right to remain employed
14 while he took leave" *Id.* The court found that the supervisor's conduct was similar
15 in nature to other cases finding that an IIED claim was possible where an employer
16 was either terminated in a deceptive manner or denied medical leave. In so finding,
17 the court expressly distinguished cases finding that similar conduct was not extreme
18 or outrageous under the Rule 12(b)(6) standard because that standard is more
19 demanding than the "no possibility" standard required at the motion to remand stage.
20 *Id.* at 1177-78, n.2.

21 Similarly, here, although Defendants may be correct that Plaintiff's IIED claim
22 would not survive a Rule 12(b)(6) motion, the Court does not find that there is no
23 possibility that the claim can proceed. Plaintiff alleges that Welter deceived Plaintiff
24 by wrongly telling him that he could not request medical leave less than two weeks in
25 advance, and in doing so denied him the right to take leave. This alleged conduct is
26 not a pure personnel management decision like simply denying medical leave or
27 terminating Plaintiff would be. As in both *Gibson* and *Calero*, the allegation that
28

1 Defendant Welter engaged in extraneous deceptive conduct¹ in carrying out the
2 management decision is enough to make it at least possible that a state court could
3 find that Plaintiff has alleged or could allege extreme and outrageous conduct to
4 support an IIED claim against Welter. Assessing the plausibility of Plaintiff's claim any
5 further would require the Court to engage in the sort of "inquiry into the merits of the
6 plaintiff's case" which the Ninth Circuit has disavowed. *Grancare, LLC*, 889 F.3d at
7 548-49.

8 Because Plaintiff can possibly state a claim for IIED against Welter in state court,
9 he is not a "sham defendant." The Court thus does not have jurisdiction based on
10 diversity and must remand the action.

11 **IV. Conclusion**

12 For the above reasons, IT IS HEREBY ORDERED that Plaintiff's Motion to
13 Remand (ECF No. 7) is GRANTED. Defendants' Motion to Dismiss (ECF No. 3) is
14 DENIED AS MOOT.

15 The Clerk of Court is directed to remand the case to the Superior Court of
16 California, County of Sacramento and close this case.

17 IT IS SO ORDERED.
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19 Dated: June 26, 2024


Hon. Daniel J. Calabretta
UNITED STATES DISTRICT JUDGE

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24 ¹ The alleged deception would also possibly put this conduct outside the preemptive scope of the
25 California Workers Compensation Act ("WCA"). Although Defendant does not raise WCA preemption
26 in its Notice of Removal or its Opposition, the Court agrees with Plaintiff's argument in his Reply that a
state court could find that deceptive management conduct is outside the "normal risk of employment."
See, e.g., *Lenk v. Total-Western, Inc.*, 89 Cal. App.4th 959, 972 (2001) (supervisor's "misrepresentations
made to induce [the plaintiff] to become an employee, w[ere] not a normal part of the employment
relationship or a risk reasonably encompassed within the compensation bargain."); *Calero*, 271 F. Supp.
2d at 1181 (finding that IIED claim was not impossible because it was unclear whether the supervisor's
deception was "so far out of the normal risks of the employment relationship as to be beyond the reach
of Workers' Compensation.").